

The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN DOE #1, an individual, JOHN DOE #2,
an individual, and PROTECT MARRIAGE
WASHINGTON,

Plaintiffs,

v.

SAM REED, in his official capacity as Secretary
of State of Washington, BRENDA GALARZA,
in her official capacity as Public Records Officer
for the Secretary of State of Washington,

Defendants.

Case No. 3:9-CV-05456-BHS

WASHINGTON COALITION FOR OPEN
GOVERNMENT'S REPLY MEMORANDUM
CONCERNING MOTION TO INTERVENE

NOTE ON MOTION CALENDAR:
SEPTEMBER 3, 2009, 2:30 P.M.

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

This Memorandum is filed in response to the Plaintiffs' Opposition to the Motion of the Washington Coalition for Open Government ("WCOG") to Intervene in the above-referenced matter. Plaintiffs, who have submitted to the State of Washington a petition referendum proposing to block implementation of a statute passed by the State Legislature, now seek to prevent parties who have requested to review the petitions under Washington State's Public Records Act ("PRA") from having access to the same. In other words, at the same time it is seeking to block a legislative enactment,

WASHINGTON COALITION FOR OPEN GOVERNMENT'S
REPLY MEMORANDUM RE MOTION TO INTERVENE - 1

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1 Plaintiffs are also seeking to have the process adopted by initiative of the citizens of the State of
 2 Washington that guarantees access and openness to government operations declared unconstitutional and
 3 to foreclose public oversight of the critical referendum process. Plaintiffs' objections to WCOG's Motion
 4 to Intervene are not well taken.

5
 6 **1. WCOG's Motion to Intervene Is Timely.**

7 The PRA was adopted by initiative of the citizens of the State of Washington in 1972. In its 37
 8 years of distinguished history in providing the citizens of this state with the procedure to oversee the
 9 operation of governmental agencies, no provision of the PRA has been declared unconstitutional. Yet,
 10 over a mere 36-day period, Plaintiffs seek to file a lawsuit, foreclose public oversight of the referendum
 11 process, and have a significant portion of the PRA declared unconstitutional, and yet object to
 12 participation by WCOG, which has filed a public records request to review the petitions and been denied
 13 access to the same to advocate for the constitutionality of the PRA.

15 Plaintiff Protect Marriage Washington filed signatures in support of the Petition for
 16 Referendum 71 on July 25, 2009, *Dkt. 2*, ¶ 40. The instant action was filed on July 29, 2009, the same
 17 day the Temporary Restraining Order was granted, without opposition by Defendants. *Dkt. 9*, p. 3. Two
 18 days later, the President of WCOG, Toby Nixon, requested, under the PRA, copies of all signed petition
 19 pages for Referendum 71. Declaration of Toby Nixon ("Nixon Dec."), ¶ 4, Exhibit "A." The request was
 20 denied by the State because of the Temporary Restraining Order. Defendants moved to join WCOG and
 21 other requesters for access to the referendum petition. On August 21, 2009, the Court denied Defendants'
 22 Motion, including in the Order the statement that WCOG should be provided "an opportunity to move to
 23 intervene if they so choose." *Dkt. 33*, p. 4. Six days thereafter, WCOG filed its Motion to Intervene and
 24 supporting documents.

26 Plaintiffs have in no fashion been prejudiced by WCOG's moving as swiftly as it has to intervene
 27 in this matter. The Temporary Restraining Order was in place, and it is assumed that the referendum
 28

petitions will not be released until the Court has provided a full hearing concerning Plaintiffs' constitutional challenge to Washington's long-standing PRA. Moreover, there is a pending objection by the State to Plaintiffs' motion to consolidate of the September 3, 2009 hearing covering a preliminary injunction with a full trial on the merits. WCOG's participation in this matter as a party will not delay timely determination by the Court of the merits of Plaintiffs' claim.

2. WCOG Has a Significantly Protectable Interest.

In objecting to WCOG's participation in this matter, Plaintiffs suggest that WCOG's sole interest in the lawsuit is "in participating in the interpretation and construction of the PRA." Plaintiffs' Opposition, p. 6. Plaintiffs ignore that, as it is permitted to do so under the PRA, WCOG has made a request to review the petitions advocating Referendum 71 and has been denied the right to review the petitions. WCOG's interest stems from its status as a party requesting access to public records. RCW 42.56.550 gives standing to a party that has been denied access to seek court review of such a determination. As Plaintiffs have argued, it is within the purview of this Court to determine whether access may be granted or whether the petitions will be closed from public review. WCOG's ability to review the petitions, as it has requested, is directly impacted by the proceedings in this Court, and, as a result, WCOG has a significantly protectable interest in participating in this litigation.

In addition, it cannot be denied that WCOG also has an interest in insuring that the PRA is afforded its full measure of effectiveness. Certainly, a Court declaration that records, concerning which there is no statutory exemption from disclosure, are foreclosed from public review because of asserted threats of harassment or criticism that are an inherent part of the political fabric in this country will have a significant impact on operation of the PRA in the future. The door will be open for allegations of similar potential criticism to be used as a road block to public oversight of governmental operations, not limited to referendum petitions. Thus, WCOG's protectable interest stems both from its status as a requester for access to the records and also from its concern over the long-range impact of this case on

access issues under the PRA.

3. WCOG Will Be Impaired and Impeded in its Ability to Protect its Interest.

Plaintiffs cite the correct standard for determining whether a proposed intervenor will be impaired or impeded in its ability to protect an asserted interest, but then completely misinterpret the same.

As indicated in Plaintiffs' Opposition, p. 8, "if an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene" (citing, *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001)) (quoting, FRCP 24, Advisory Committee's Notes).

WCOG did not seek to intervene in this action until the State informed it that the records would not be released because of the pending lawsuit.

WCOG has made a request for access to the petitions submitted in support of the referendum. If this Court were to determine that public access to the petitions is foreclosed because of the arguments raised by Plaintiffs, WCOG's ability to review the petitions would be denied. Clearly, foreclosing public review of the referendum petitions not only affects, but completely obliterates, WCOG's request to review the petitions. Therefore, "in a practical sense," WCOG will be substantially affected by the determination made in this action.

4. The Interest of WCOG Is Not Adequately Represented by the State.

The PRA did not originate as a legislative enactment. Rather, a diverse array of citizens groups, such as the League of Women Voters, Common Cause, and the predecessor to WCOG—the Coalition for Open Government came together to propose an initiative to be submitted to the citizens of the State of Washington. In November of 1972, the PRA was passed by Washington voters, and the law took effect on January 1, 1973. The PRA is an initiative of the people of the State of Washington and not the governmental agencies of the State of Washington.

Moreover, the original preamble to the PRA, now incorporated as RCW 42.56.030, underscores

1 that the purpose of the PRA is to allow Washington citizens to oversee the operation of government
2 agencies:

3 The people of this state do not yield their sovereignty to the agencies that serve the people.
4 The people, in delegating authority, do not give their public servants the right to decide
5 what is good for the people to know and what is not good for them to know. The people
6 insist on remaining informed so that they may maintain control over the instruments that
7 they have created. This chapter shall be liberally construed and exemptions narrowly
8 construed to promote this public policy.

9 While Defendant state officials may assert valid and persuasive arguments opposing Plaintiffs
10 request that a public referendum process proceed in a confidential fashion, the PRA makes it clear that
11 the beneficiaries of its provisions are the people of this State. The purpose of the statute is to allow
12 public oversight of Washington agencies by Washington citizens. Clearly, the interest of Defendants and
13 WCOG, as a representative of citizens of the State, are not necessarily co-extensive. In fact, Washington
14 public officials have already reviewed signatures on the referendum petitions submitted by Plaintiffs.
15 Who has been denied access to the petitions are the citizens of the State of Washington, not the
16 governmental agencies who, in the terms in the words of RCW 42.56.030, are the "servants" of the
17 people. While State agencies and officials, including Defendants, have reviewed the signatures on the
18 petitions in question, the citizens of the State, including WCOG, remain completely in the dark. If the
19 words of the PRA are to have any meaning, then the people of the State, as represented by WCOG, need
20 to be able to assert their rights to access the signatures "so that they may maintain control over the
21 instruments that they have created."

22 **5. Alternatively, WCOG Should Be Granted Permissive Intervention.**

23 Since WCOG's claim for joinder as a matter of right, for the reasons set out above, should be
24 granted, it follows that its Motion, in the alternative, for Permissive Joinder, should also be granted.
25

26 Plaintiffs suggest in their Opposition that "WCOG does not have a claim or defense that shares
27 with the main action a common question of law or fact." Plaintiffs' Opposition, p. 12. This response
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borders on the incredulous since the common question of fact is whether WCOG's request for access should be denied, which is the relief, from a factual perspective, that Plaintiffs seek. Moreover, the common question of law is whether the strong mandate for access to public records, as evidenced in a set of statutes that has provided for the same since 1972, should be declared unconstitutional. Thus, from a factual perspective, WCOG argues, in opposition to Plaintiffs, that it should be granted access to the petition signatures, and from a legal perspective, WCOG asserts that Plaintiffs' claim of unconstitutionality is without merit.

Moreover, WCOG has an independent basis for jurisdiction under the provisions of the PRA, which mandate that access to public records be granted unless a statutory exemption can be established. In other words, WCOG has a clear right under RCW 42.56.550 to seek court review of the State's denial of its request for access to the petition signatures. This is a statutory provision which, of course, Plaintiffs have ignored, as they have all other provisions of the PRA.

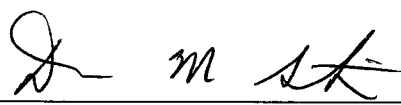
For purposes of judicial comity, WCOG's assertions as to its right of access to the referendum petitions under the PRA, based on the long-standing tradition in this State allowing citizens to oversee the operations of government, must be considered at the same time Plaintiffs' speculation as to possible criticism is considered.

II. CONCLUSION

As for the reasons set out above, WCOG's Motion to Intervene in this matter should be granted.

DATED this 2nd day of September, 2009.

WITHERSPOON, KELLEY, DAVENPORT
& TOOLE, P.S.

By: 
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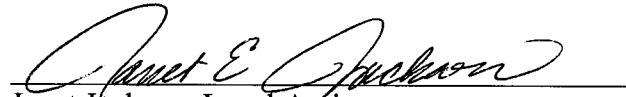
CERTIFICATE OF SERVICE

1. I, Collette N. Robbins, am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within action. I am employed by the law firm of Witherspoon, Kelley, Davenport & Toole, 422 W. Riverside Avenue, Suite 1100, Spokane, Washington.

2. On the 2nd day of September, 2009, I caused to be served upon the parties via the CM/ECF filing system, the Washington Coalition for Open Government's Reply Memorandum Concerning Motion to Intervene, which system will send notification of such filing to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


Janet Jackson, Legal Assistant